

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

JUAN JOEL GARCIA,

Petitioner,

vs.

No. CIV-08-0881 BB/KBM

**TIMOTHY HATCH, Warden, and
GARY K. KING, Attorney General for the
State of New Mexico,**

Respondents.

**RESPONDENTS' RESPONSE TO PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION (DOC. 12)**

Respondents, by counsel, Margaret McLean, Assistant Attorney General, hereby file this Response to the Proposed Findings and Recommended Disposition, Doc. 12, filed on March 12, 2009. 28 U.S.C. § 636(b)(1). The response is timely filed on or before April 13, 2009.

Respondents agree with the recommendation that the Petition, Doc. 1, filed pursuant to 28 U.S.C. § 2254, be dismissed with prejudice because the Petition is time barred.

RESPONSE

Respondents appreciate the opportunity to file a response. Respondents recognize and accept this Court's detailed analysis of the dates. Counsel for Respondents apologizes for any mistake or oversight in the recitation of the correct filing dates of certain pleadings. This Court's keen attention to detail establishes over a one-year delay between the denial of the state habeas corpus petition and the filing of a petition for writ of certiorari in the New Mexico Supreme Court. Petitioner has offered no explanation for this extraordinary delay and why the New Mexico rules of procedure should be excused.

Proposed Findings, at 2, n 1. The New Mexico Supreme Court denied certiorari review following the direct appeal to the New Mexico Court of Appeals. The denial of review was on May 24, 2004. Doc. 11, Answer, Exhibit K. Any use of the date of May 25, 2004 by Respondents in the Answer was incorrect.

Respondents agree that the denial date does not affect the calculations for the time-bar.

Proposed Findings, at 2. Respondents agree that Petitioner's conviction became "final" for purposes of 28 U.S.C. § 2244(d)(1)(A) on August 23, 2004, ninety days following the entry of the order denying certiorari review and available for Petitioner to seek certiorari review in the United States Supreme Court.

Proposed Findings, at 3. The order denying state habeas corpus relief was

entered on April 19, 2007. Doc. 11, Answer, Exhibit P. According to Rule 5-802 NMRA and Rule 12-501, Petitioner had thirty days, absent the granting of an extension of time, from April 19, 2007 to file a petition for certiorari in the New Mexico Supreme Court. The deadline was May 19, 2007, a Saturday. The actual due date was Monday, May 21, 2007.

The petition was first and erroneously filed in the New Mexico Court of Appeals on May 30, 2008. Doc. 11, Answer, Exhibit Q (showing stamped file date). The petition was refiled in the New Mexico Supreme Court on June 19, 2008. Doc. 11, Answer, Exhibit Q (showing stamped file date). Respondents did not raise or address the untimely filing of the petition. The New Mexico Supreme Court denied review on July 10, 2008, without any comment on the untimely filing of the petition. Doc. 11, Answer, Exhibit R.

After review of the filing, Respondents agree with the following statement, “I disagree that this request for review was timely filed.” Respondents also agree with the finding “Not only was the document filed in the wrong court, it was filed more than a year too late.” Respondents submit there is no valid reason to excuse the extreme delay—beyond the thirty days permitted by New Mexico rules—for the filing of the petition for writ for certiorari following the denial of the state habeas corpus petition on April 19, 2007.

Respondents also agree with the finding: “Failing to abide by state filing

rules for time and place renders the state filing ‘not properly filed’ for federal tolling purposes, regardless whether the state court dismisses on procedural grounds.” (including citations at 4, n. 7).

Proposed Findings, at 4-5 and n. 8. Respondents agree with the finding that “the federal statute of limitations had already expired by the time those state proceedings were instituted.”

Proposed Findings, at 5. The Petition was filed on September 25, 2008, Doc. 1, at 1. The certificate of service was dated September 23, 2008. Doc. 1, at 26. Both dates are beyond the deadline of August 20, 2008, calculated if this Court considered the state post-conviction proceedings to have validly tolled the limitations period. Petitioner was not “three days” late but rather 34 days late (time from August 20, 2008 to September 23, 2008, date of certificate of service); or 36 days late (time from August 20, 2008 to Septemer 25, 2008, date of filing). Either calculation of the time bar results in the finding that the Petition is time barred.

Respondents agree with the two alternative calculations regarding the time bar made in the Proposed Findings. The Petition should be dismissed with prejudice. 28 U.S.C. § 2244(d)(1).

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Respectfully submitted,

GARY K. KING
Attorney General

Electronically filed
/s/ Margaret McLean
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Assistant Attorney General

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April 2009, I filed the foregoing
RESPONDENTS' RESPONSE TO PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION (DOC. 12) electronically through the CM/ECF
system. I further certify that on such date I served the foregoing on the following
non-CM/ECF participant in the manner indicated:

Via first-class mail, postage prepaid, and addressed to:

Juan Joel Garcia, #59634
Guadalupe County Correctional Facility
Post Office Box 520
Santa Rosa, New Mexico 88435-0520

/s/ Margaret McLean
Margaret McLean
Assistant Attorney General